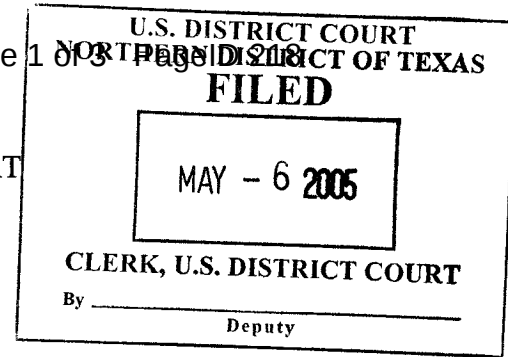


ORIGINAL



IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA

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VS.

NO. 3-02-CR-0384-M

NO. 3-05-CV-0348-M

HECTOR CAMPOZANO-TIERRABLANCA

Defendant.

**FINDINGS AND RECOMMENDATION OF THE
UNITED STATES MAGISTRATE JUDGE**

Defendant Hector Campozano-Tierrablanca, appearing *pro se*, has filed a motion to correct, vacate, or set aside his sentence pursuant to 28 U.S.C. § 2255. For the reasons stated herein, the motion should be denied.

I.

Defendant pled guilty to illegal re-entry after deportation in violation of 8 U.S.C. § 1326(a) & (b)(2). Punishment was assessed at 77 months confinement followed by supervised release for a period of three years. His appeal was dismissed as frivolous. *United States v. Campozano-Tierrablanca*, 87 Fed.Appx. 409, 2004 WL 306001 (5th Cir. Feb. 18, 2004). Defendant also filed a motion to modify his sentence under 18 U.S.C. § 3582(c)(2). That motion was denied. *United States v. Campozano-Tierrablanca*, No. 3-02-CR-0384-M (N.D. Tex. Dec. 23, 2004), *rec. adopted*, (N.D. Tex. Jan. 15, 2005). Defendant now seeks post-conviction relief pursuant to 28 U.S.C. § 2255.

II.

In two grounds for relief, defendant contends that: (1) his sentence was enhanced based on facts not submitted to the jury or proved beyond a reasonable doubt in violation of the Sixth Amendment to the United States Constitution; and (2) he received ineffective assistance of counsel.

A.

Defendant first argues that his 16-level sentence enhancement under U.S.S.G. § 2L1.2(b)(1)(A) is unconstitutional.¹ In *Blakely v. Washington*, ___ U.S. ___, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), a majority of the Supreme Court held that an enhanced sentence imposed by a judge under the Washington Sentencing Reform Act, which was based on facts neither admitted by the defendant nor found by a jury, violated the Sixth Amendment to the United States Constitution. *Blakely*, 124 S.Ct. at 2538. The Court recently extended its holding in *Blakely* to invalidate the mandatory nature of the federal sentencing guidelines. *United States v. Booker*, ___ U.S. ___, 125 S.Ct. 738, 759, 160 L.Ed.2d 621 (2005). However, *Booker* does not apply retroactively to cases on collateral review. *Id.*, 125 S.Ct. at 769 (Breyer, J.), citing *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 716, 93 L.Ed.2d 649 (1987) (holding that decision applies "to all cases on *direct review*") (emphasis added). See also *In re Elwood*, ___ F.3d ___, 2005 WL 976998 at *3 (5th Cir. Apr. 28, 2005) (citing cases) (holding that *Booker* is not applicable to cases already final). Consequently, defendant is not entitled to post-conviction relief on this ground.²

B.

In a related claim, defendant contends that his attorney was ineffective for failing to object to the 16-level enhancement for being previously deported after a conviction for a crime of violence. The Sixth Amendment guarantees a defendant reasonably effective assistance of counsel at all

¹ Under the federal sentencing guidelines, the base offense level for unlawfully entering or remaining in the United States is eight. U.S.S.G. § 2L1.2(a). However, if the defendant previously was deported after a conviction for a felony that is a crime of violence, the base offense is increased by 16 levels. *Id.* § 2L1.2(b)(1)(A). Here, defendant previously was deported after being convicted of aggravated assault with a deadly weapon. (See PSR at 4-5, ¶¶ 19 & 28).

² The court also notes that the fact of a prior conviction need not be charged in the indictment or proved to a jury beyond a reasonable doubt. See *United States v. Amaya-Torres*, 2000 WL 33348193 at *1 (W.D. Tex. Aug. 21, 2000), citing *Almendarez-Torres v. United States*, 523 U.S. 224, 235, 118 S.Ct. 1219, 1226, 140 L.Ed.2d 350 (1998). Moreover, defendant waived his right to raise this claim as part of the plea agreement. (See Plea Agr. at 5, ¶ 10).

critical stages of a criminal proceeding. *See Cuyler v. Sullivan*, 446 U.S. 335, 344, 100 S.Ct. 1708, 1716, 64 L.Ed.2d 333 (1980). In order to obtain post-conviction relief, a defendant must prove that the performance of his attorney was constitutionally inadequate and that such deficiency prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 692-94, 104 S.Ct. 2052, 2067-68, 80 L.Ed.2d 674 (1984). Prejudice results when there is a reasonable probability that, but for counsel's unprofessional errors, the defendant would have received a "less harsh sentence." *United States v. Grammas*, 376 F.3d 433, 437-38 (5th Cir. 2004).

The presentence investigation report shows that defendant was convicted of aggravated assault with a deadly weapon in 1996. This is a "crime of violence" under the federal sentencing guidelines. *See* U.S.S.G. § 2L1.2, comm.³ Upon his release from prison, defendant was deported to Mexico. He subsequently re-entered the United States without the consent of the Attorney General. (*See* PSR at 2-3, ¶¶ 9-13; 3-4, ¶ 19; 5, ¶ 28). Defendant does not contest any of these facts. Nor does he explain what objection counsel should have made. Under these circumstances, defendant is not entitled to post-conviction relief. *See Clark v. Collins*, 19 F.3d 959, 966 (5th Cir.), *cert. denied*, 115 S.Ct. 432 (1994) (counsel not ineffective for failing to make meritless objections).

RECOMMENDATION

Defendant's motion to correct, vacate, or set aside sentence should be denied.

DATED: May 6, 2005.


JEFF KAPLAN
UNITED STATES MAGISTRATE JUDGE

³ The term "crime of violence" means, *inter alia*, "aggravated assault . . . , or any offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another." U.S.S.G. § 2L1.2, comm.